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FOLLOW THE YELLOW BRICK ROAD: THE LEGISLATIVE PATH TO FINDING A HEART FOR SECURITIES REGULATIONS

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I. INTRODUCTION

As the number of United States corporations operating internationally increases,¹ so does apprehension that these corporations are exploiting lower labor standards overseas in an attempt to maximize corporate profits.² The number of entities with global operations increased over 300% between 1990 and 2000,³ and the practice of transitioning U.S. businesses from domestic-based operations into the global marketplace has become common.⁴ “Globalization is now a fact of life for many American businesses and their employees. Business operations have increasingly expanded beyond U.S. borders either directly or through affiliations of varying kinds with foreign-based entities.”⁵ These international corporations (ICs)⁶ are suspected of operating in violation of globally recognized

1. See Carrie Hall, *Are Emerging Market TNCs Sensitive to Corporate Responsibility Issues? Observations from the United Nations Global Compact*, J. CORP. CITIZENSHIP, June 22, 2007, at 30. See also Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 LAB. LAW. 417 (2002). Globalization of businesses has “important potential implications for labor-management relations and issues.” *Id.*

2. Rachel Cherington, Comment, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10B-5*, 25 U. PA. J. INT’L ECON. L. 1439 (2004). See also Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT’L L. 389, 398 (2005).

3. “The past decade has seen a rapid increase in the number, size and scope of transnational companies[,] . . . growing from 3,000 in 1990 to 13,000 within ten years.” Hall, *supra* note 1.

4. Moldof, *supra* note 1.

5. *Id.*

6. For purposes of this article, the author only discusses publicly traded business entities incorporated in any U.S. jurisdiction, subject to regulation by the Securities Exchange Commission (SEC) and required to register with the SEC pursuant to the Securities Exchange Act of 1934. Securities Exchange Act of 1934, 15 U.S.C. § 781(a) (2006).

principles governing labor standards because ICs are essentially immune from any legitimate ramifications due to jurisdictional limitations.⁷ ICs are able to avoid responsibility for these violations under U.S. and international regulations because the “laws and obligations pertain primarily to state actors, not to private actors in the international arena.”⁸ Before concern of the impunity of ICs can be resolved, the effect ICs have on labor and human rights internationally must be identified. Lack of transparency and accountability make tracking the impact ICs have on the international community, specifically in relation to labor and human rights practices, particularly problematic. Elucidation of human rights reporting processes is the first step for U.S. businesses towards becoming more responsible participants in the international business community. At a minimum, ICs should be subject to disclosure requirements regarding these issues, consistent with the spirit and purposes of the Securities Exchange Commission (SEC)⁹ as applied to labor and human rights disclosures. Enhanced disclosure requirements will encourage ICs to become more cognizant of their corporate footprint and conscientious of the impact of their activities internationally.

The purpose of this article is to identify why federal legislation is the best, most efficient option for promoting transparency and initiating the progression of public disclosures regarding human rights liabilities for ICs.¹⁰ Federal legislation will provide a timeframe and identify standards for ICs, and consequentially, the SEC will have to promulgate regulations in order to comply with federal requirements. First, it is important to understand the current regulatory scheme dictating mandatory disclosures already applicable to ICs; this will be discussed in Part II. Part III discusses some of the current statutory and administrative rules governing reporting requirements for publicly traded corporations. It also discusses the process for including shareholder initiatives regarding human rights disclosures in annual meetings. Next, some of the initiatives ICs have taken independent of

7. Cherington, *supra* note 2, at 1440.

8. *Id.*

9. The Securities Exchange Commission (SEC) was created pursuant to the Securities Exchange Act of 1934, and it is the governing agency for publicly traded securities. Securities Exchange Act § 78d.

10. Alternatives to legislation are discussed *infra* Part V.A.

their legal obligations to show a commitment to social responsibility are identified,¹¹ thereby providing evidence that many ICs are already participating in some sort of disclosure or reporting as part of their regular business practices. Part IV of this article discusses internal tactics ICs implement to create and manage standards of corporate responsibility at the organizational level. Finally, Part V identifies the channels through which modification of the reporting requirements of ICs can be achieved. It also isolates a legitimate opportunity to utilize the unique social and political climate to promote improvement of labor standards internationally.

II. BACKGROUND: THE ROAD TO REGULATION

A. Footprints on the International Community

The footprints ICs leave internationally are evident on a variety of levels.¹² Human rights organizations¹³ and non-governmental organizations have been instrumental in bringing some of these concerns to public attention.¹⁴ In 2005, a complaint was filed against Walmart alleging a variety of injuries sustained by workers in the factories of Walmart sub-contractors in China, Bangladesh, Indonesia, Swaziland, and Nicaragua.¹⁵ The list of grievances included claims of forced overtime, wages inconsistent with legal requirements, and

11. The concepts of social responsibility, corporate responsibility, and corporate social responsibility are used interchangeably for purposes of this article. These concepts refer to the environmental and social impact ICs have as a result of their operations.

12. See HUMAN RIGHTS WATCH, ON THE MARGINS OF PROFIT: RIGHTS AT RISK IN THE GLOBAL ECONOMY (Feb. 18, 2008), available at <http://www.hrw.org/en/node/62409/section/1> [hereinafter ON THE MARGINS OF PROFIT].

13. *Id.*

14. For example, an organization was established to disseminate information about Coca-Cola's utilization of labor in Colombia, where exploitation of violence against union activists is common. See Campaign to Stop Killer Coke, <http://www.killercoke.org/news.htm> (last visited Dec. 9, 2009).

15. The excerpt of the Walmart complaint referenced is available in The Global Workplace. ROGER BLANPAIN ET AL., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW 591-96 (2007); see also *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (affirming the district court's dismissal for failure to state a claim).

unsafe working conditions.¹⁶ Specifically, “[t]he lawsuit accuses Walmart subcontractors of paying wages below the legal minimum, forcing workers to work overtime without compensation, locking workers in factories, physically abusing employees, withholding months’ worth of pay, and punishing workers who try to unionize.”¹⁷

These accusations seem quite detached from the image of a responsible international participant the retail juggernaut strives to perpetuate.¹⁸ Yet, as recently as 2008, the *New York Times* reported Walmart was still connected to the exploitation of laborers in China.¹⁹ The article indicated Walmart obtained products from a Chinese factory employing child laborers.²⁰ Almost a year later in October 2008, yet another report was published recounting the abusive conditions in a Walmart garment factory primarily supplying children’s attire, this time in Bangladesh.²¹ Over *three years* after the 2005 complaint was filed against Walmart on behalf of workers, researchers were still identifying many of the same poor working conditions in factories supplying goods to the company.²² Workers again complained about compulsory overtime without pay and low wages.²³ Some laborers reported earning as little as twenty U.S.

16. BLANPAIN ET AL., *supra* note 15, at 592.

17. See *Lawsuit Claims Wal-Mart Condone Overseas Sweatshops*, ETHICS NEWSLINE, Sept. 19, 2009, <http://www.globalethics.org/newsline/2005/09/19/lawsuit-claims-wal-mart-condones-overseas-sweatshops/>.

18. For Walmart’s explanation of how it strives to become a better, more sustainable company, see Walmart, Sustainability, <http://walmartstores.com/Sustainability/> (last visited Dec. 9, 2009). For example, in late 2009 Walmart subsidiary Sam’s Club announced plans to carry Brazilian fair trade coffee. See Carly Weeks, *Cadbury Dips Into Fair-Trade Market*, GLOBE AND MAIL, Aug. 26, 2009, at L1.

19. David Barboza, *In Chinese Factories, Lost Fingers and Low Pay*, N.Y. TIMES, Jan. 5, 2008.

20. *Id.*

21. BJORN CLAESON, SWEATSHOP SOLUTIONS? ECONOMIC GROUND ZERO IN BANGLADESH AND WAL-MART’S RESPONSIBILITY 6 (Victoria Kaplan ed., 2008), http://www.sweatfree.org/docs/SFC_SweatshopSolutions_loRes.pdf. The report was compiled using results from exhaustive interviews with almost 100 workers in Bangladesh between September 2007 and September 2008. *Id.*

22. *Id.*

23. *Id.*

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dollars per month, below Bangladesh legal requirements,²⁴ and drastically lower than the U.S. federal minimum wage standard.²⁵ Additionally, they reported regular subjection to physical and verbal abuse.²⁶

Despite these complaints, it is difficult to hold Walmart and other companies responsible without any legitimate mechanisms for accountability.²⁷ According to Robert Reich, former U.S. Secretary of Labor, Walmart is merely an effective business model of American capitalism.²⁸ Namely, “Wal-Mart has devised an extremely efficient way to deliver low prices to consumers and good returns to shareholders.”²⁹ Adds Reich, “[i]f we are not happy about the results, then the real question we ought to be asking ourselves is whether we should be changing the rules.”³⁰ Unfortunately, the contention of abusive practices used by Walmart is not the only illustration of how ICs impact workers globally.

For almost seventy years Firestone has operated a rubber plantation in Liberia.³¹ In 2007, a complaint against Firestone was filed in federal district court.³² Petitioners were described as poverty stricken Africans, trapped in a system with quotas so unattainable that child laborers must work alongside their parents in order for families to meet their mandated rubber collection requirements.³³ The workers alleged regular exposure to the dangers of raw rubber and substandard

24. *Id.*

25. Fair Labor Standards Act, 29 U.S.C. § 206(a)(1) (2006). The current federal minimum wage is \$7.25. *Id.*

26. CLAESON, *supra* note 21, at 6.

27. See Joseph Nocera, *Our Love-Hate Relationship With Wal-Mart*, N.Y. TIMES, Nov. 5, 2005, at C1 (explaining that Walmart is a company that “for the most part, has played by the rules we as a society have set for it.”).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Dire Working and Living Conditions in Firestone Rubber Plantation Exposed*, NEWS FROM AFRICA: PRESS REVIEW (Liberia), May 25, 2005, available at http://newsfromafrica.org/newsfromafrica/articles/art_10283.html [hereinafter *Dire Working*].

32. *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

33. *Id.* at 992.

sewage systems, compromising their health.³⁴ Firestone was accused of failing to provide safe working conditions and exploiting the Liberian government's failure to intervene on behalf of these people.³⁵ These are just a few examples demonstrative of exploitative practices used by companies functioning internationally.³⁶

B. Get a Brain—It's the Economy

With announcements of layoffs from companies across the nation becoming commonplace,³⁷ there is considerable concern about the U.S. economy's fragility.³⁸ Today's economic crisis is frighteningly similar to the post-Enron market conditions that sparked substantial corporate reform in 2002.³⁹ During the Enron crisis, the resulting decline in investor confidence resulted in serious damage to the New York Stock Exchange as the value of securities plummeted.⁴⁰ Richard A. Grasso, Chairman of the New York Stock Exchange during the

34. *Id.* at 994-95.

35. *Id.*

36. For more examples of how ICs leave their mark on the international community, see *ON THE MARGINS OF PROFIT*, *supra* note 12.

37. See, e.g., Jon Swartz, *Yahoo Profit Falls; Up to 1,500 Jobs to Be Cut*, U.S.A. TODAY, Oct. 22, 2008, at 9A (reporting a possible 1,500 layoffs in San Francisco); Beth Healy, *Fidelity Adds 1,700 Layoffs in Start of 2009*, BOSTON GLOBE, Nov. 15, 2008, at 9 (detailing the second wave of layoffs in Boston following the release of 1,300 employees on November 12, 2008); Ashlee Vance, *Crisis Hits Tech Sector With Layoffs as Sales Slump*, N.Y. TIMES, Nov. 15, 2008 (reporting the Sun Microsystems announcement to cut between 5,000 and 6,000 workers, accounting for approximately fifteen to eighteen percent of the company's total workforce); Dominic Gates, *Boeing Plans Layoffs, Consolidation of Flight-test Operations*, SEATTLE TIMES, Oct. 16, 2009, available at http://seattletimes.nwsourc.com/html/boeingaerospace/2010074087_boeing16.html (reporting that Boeing plans to lay off 200 to 300 workers in the Puget Sound region); Kara Spak & Fran Spielman, *Layoff Notices for Bus Drivers, Other CTA Workers*, CHICAGO SUN TIMES, Oct. 20, 2009, at 9 (reporting layoffs of nearly 2,000 employees).

38. David Leonhardt, *Top Priority is Stabilizing the Patient*, N.Y. TIMES, Nov. 6, 2008, at B1.

39. See, e.g., Richard A. Oppel Jr., *Corporate Conduct: The Legislation; Senate Backs Tough Measures to Punish Corporate Misdeeds*, N.Y. TIMES, July 11, 2002, at A1.

40. Patrick McGeehan, *After the "Darkest Year," A Changed Wall St.*, N.Y. TIMES, Sept. 8, 2002, at 31.

Enron scandal, commented on the 2002 crisis.⁴¹ Grasso compared the financial catastrophe to the 1929 stock market collapse;⁴² the trigger ultimately leading to the worst financial catastrophe in U.S. history—the Great Depression.⁴³ However, the 110th Congress responded quickly by passing the Sarbanes-Oxley Act of 2002 (SOA), mandating harsher punishments and more extensive regulation for corporate executives.⁴⁴ These new regulations were “reflect[ive of] the extraordinary momentum that corporate reform legislation . . . gained in the wake of . . . scandals involving Enron, WorldCom and Tyco.”⁴⁵ The reforms included significant changes increasing liability for corporate wrongdoers; the text of the SOA incorporated specific accountability mechanisms for officers of ICs.⁴⁶ The new regulations signified a response to the demand from the public to hold people accountable for the accuracy and veracity of disclosures.⁴⁷

The existing financial emergency in the United States mirrors, and is much worse than, the 2002 economic environment.⁴⁸ In response to this crisis, Americans have overwhelmingly called for change, particularly palpable during the 2008 election.⁴⁹ Over three million people contributed to the 2008 presidential election campaign effort, and on November 4, 2008 an estimated 135 million votes were cast across the country by U.S. citizens.⁵⁰ “The country wants a change. It

41. *Id.*

42. *Id.*

43. For more information about the causes and impact of the Great Depression, see MURRAY M. ROTHBARD, *AMERICA'S GREAT DEPRESSION* (The Ludwig von Mises Institute, 5th ed. 2000).

44. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7241 (2006).

45. Oppel, *supra* note 39.

46. Sarbanes-Oxley Act § 7241. This section of the Act, entitled “Corporate Responsibility for Financial Reports,” is indicative of the type of additional duties and requirements for officers. *Id.*

47. Oppel, *supra* note 39.

48. *Wall Street Sells Off as Consumers Snap Wallets Shut*, *TRADE ARABIA*, Nov. 15, 2008. This is the “worst financial crisis in 80 years.” *Id.*

49. See *Closing Arguments: Campaign 2008*, *NAT'L REV.*, Nov. 3, 2008, available at 2008 WLNR 25810607 [hereinafter *Campaign 2008*]. See also Leonhardt, *supra* note 38 (“This year’s election coincided with an important moment in the financial crisis.”).

50. Sandra Sobieraj Westfall & Bill Hewitt, *President-Elect Barack Obama: “All Things are Possible,”* *PEOPLE WEEKLY*, Nov. 17, 2008, at 52.

is fed up with both parties, but especially Republicans after eight years of Bush. The financial crisis has heightened that mood.”⁵¹ Voters not only replaced a Republican president with a Democratic candidate, but Democrats also won Congressional seats across the United States.⁵² The excitement around the election spawned a new generation of activists engaged in government.⁵³ This resulted in a political and social environment ripe for legislation mandating some recognizable standards of corporate responsibility and reporting requirements for labor rights⁵⁴ issues.⁵⁵ This call for greater accountability and transparency signifies the possibility of extending reforms beyond what has historically been limited to economic regulation,⁵⁶ and the opportunity for human rights activists to support reporting and accountability mechanisms applicable to ICs. This creates a unique

51. *Campaign 2008*, *supra* note 49.

52. “[T]he Democrats in Tuesday’s elections expanded their majorities in both the House and the Senate.” David M. Herszenhorn & Carl Hulse, *Democrats in Congress Vowing To Pursue an Aggressive Agenda*, N.Y. TIMES, Nov. 6, 2008, at A1. The authors estimated at that time that the Democrats picked up five seats in the Senate and nineteen in the House. *Id.*

53. See Opinion, *Let’s Get Better at Listening to Young People*, THE MORNING CALL, Nov. 14, 2008, at A11 (indicating that over twenty million votes were cast by people aged eighteen to thirty, up two million from the 2000 presidential election).

54. Many scholars have connected the concept of labor rights as a basic human right, and for the purpose of this article these terms are used interchangeably. See generally JAMES A. GROSS, *WORKERS’ RIGHTS AS HUMAN RIGHTS* (2006) (a collection of articles describing the concept of labor rights functioning as a fundamental human right, particularly in relationship to U.S. labor practices).

55. According to an interview with Trina Hamilton, Ph.D., assistant professor at the State University of New York at Buffalo, “[t]he Wall Street crisis could ultimately change the way society views corporate responsibility.” Press Release, University at Buffalo, What Will Financial Crisis Mean for “Corporate Responsibility?” (Oct. 6, 2008). Dr. Hamilton hypothesizes that “if the public debate shifts toward a greater willingness to re-regulate, then companies are going to have to plan to compete in a new, more leveled regulatory environment, rather than using voluntary corporate responsibility initiatives as a means to stand out from the competition.” *Id.*

56. Dr. Hamilton hypothesizes that hesitance to enact additional regulations will decrease as the United States approaches a “final tipping point” resulting from the culmination of the Enron-like scandals and the current financial crisis. *Id.*

opportunity for advocating improved regulation of labor activities internationally; specifically through the SEC.⁵⁷

III. EXISTING LEGAL STANDARDS GOVERNING CORPORATIONS

Any corporation issuing shares or stocks to the public is required to register with, and is governed by, the SEC.⁵⁸ By virtue of offering shares or stock to the public without an applicable exemption, a corporation subjects itself to regulation.⁵⁹ The SEC functions to protect “a national public interest which makes it necessary to provide for regulation and control of such transactions . . . to insure the maintenance of fair and honest markets in such transactions.”⁶⁰ Requirements promulgated by the SEC have become the prevailing legal thresholds dictating disclosure requirements for ICs issuing securities.⁶¹ Pursuant to the authority given to the SEC through the Securities Exchange Act of 1934, some of the priorities of the SEC include: “[p]ublic disclosure of pertinent facts” relating to a public offering,⁶² enforcement of disclosure requirements and regulation in trading,⁶³ investigation of fraud,⁶⁴ issuance and enforcement of sanctions⁶⁵ and general supervision, administration, and regulatory

57. Other authors have discussed the role of the Securities Exchange Commission (SEC) in requiring social disclosures. However, this discussion has been limited to disclosures required under *existing* SEC regulations. See, e.g., Cynthia A. Williams, *The Securities Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

58. Securities Exchange Act of 1934, 15 U.S.C. § 78l(g)(1) (2006). The code requires that “[e]very issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce” shall register with the SEC. *Id.* Securities that are exempted from regulation are not discussed in this article.

59. *Id.* § 78l(a).

60. *Id.* § 78b.

61. Pursuant to its authority, the SEC can determine reporting requirements for publicly traded corporations. *Id.* § 78q.

62. Securities and Exchange Commission, 17 C.F.R. § 200.1(a) (2002).

63. *Id.* § 200.1(b)-(c).

64. *Id.* § 200.1(d).

65. *Id.*

responsibilities.⁶⁶ With these purposes in mind, the SEC has created rules for ICs governing disclosures related to initial public offering and tender offer disclosures and annual reporting requirements.⁶⁷ The SEC's S-K form itemizes required disclosures for ICs.⁶⁸

A. Required Disclosures

Existing SEC disclosure requirements apply in a variety of capacities. ICs are required to make annual financial disclosures and submit registration statements in addition to other disclosure requirements.⁶⁹ ICs also are obligated to prepare *any* other reports the SEC determines necessary pursuant to their power.⁷⁰ This results in broad regulatory power for the SEC. As the purpose of the SEC is to protect the public in securities transactions,⁷¹ it is no surprise that truthfulness and accuracy are priorities.⁷² This is particularly evident in SEC requirements governing security offerings which mandate that materials related to the sale must not be misleading.⁷³ A statement is misleading if it includes either a false statement of material fact, or if it fails to include a material detail made in the offering document that is misleading.⁷⁴ A material statement is anything with a "substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered."⁷⁵ This

66. *Id.* § 200.1(f)-(h).

67. *See id.* § 229.10. These reports must be filed with the principal office of the SEC or via electronic submission through the EDGAR system. *See id.* § 202.7. *See also* Williams, *supra* note 57, at 1207.

68. Securities and Exchange Commission, 17 C.F.R. §§ 229.10-229.702 (2002).

69. *Id.* § 240.13a-1.

70. *Id.* § 232.101 (delineating mandatory electronic submissions).

71. Securities Exchange Act, 15 U.S.C. § 78b (2006).

72. The prohibition of misleading materials appears in a variety of places. *See, e.g.,* Securities Exchange Act of 1933, 15 U.S.C. § 77q(a) (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006); Securities and Exchange Commission, 17 C.F.R. § 240.13b2-2 (2002); *id.* § 230.156(a).

73. Securities and Exchange Commission, 17 C.F.R. § 240.13b2-2(a) (2002).

74. *Id.* § 230.156(a).

75. *Id.* § 230.405.

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materiality requirement is enforceable by the SEC⁷⁶ and through a private right of action.⁷⁷ Following the collapse of Enron, liability for failure to disclose material facts in financial reports became more stringent.⁷⁸

In addition to the disclosures ICs are required to make pursuant to annual and initial public offering reporting requirements, ICs must provide information to shareholders in conjunction with an IC's annual meeting.⁷⁹ Before the meeting, ICs are required to send out materials to shareholders about what proposals will be voted on at the meeting.⁸⁰ These statements must also include all information or trends that are likely to occur or impact the financial condition of the business.⁸¹ Additionally, the Supreme Court has concluded that information is material and must be included in the statements sent to shareholders "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."⁸²

Shareholders can also initiate specific proposals to be included at the meeting, and often times these items are communicated to the other shareholders via a proxy statement.⁸³ These proposals are a shareholder's "recommendation or requirement that the company and/or its board of directors take a [particular] course of action."⁸⁴ However, this privilege is limited to shareholders that own a minimum

76. See *id.* § 200.1(b) (indicating that the responsibilities of the SEC include "enforcement of disclosure requirements").

77. *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 (1971) (recognizing a 10b-5 private right of action when an IC denies access to material information).

78. See, e.g., Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1; Oppel, *supra* note 39; *Sarbanes-Oxley Aims to Address Accounting Scandals*, CARD NEWS, Dec. 11, 2002, available at 2002 WLNR 7762189. See also *supra* Part I.

79. As part of the SEC requirements, ICs must communicate with all beneficial owners regarding the annual shareholder meeting and any items to be voted on at said meeting. Securities Exchange Act, Obligation of Registrants in Communicating with Beneficial Owners, 17 C.F.R. § 240.14a-13 (2002).

80. *Id.* § 240.14a-13(a)

81. *Caterpillar, Inc.*, Release No. 363, 50 S.E.C 903 (Mar. 31, 1992).

82. *TSC Indus., Inc. v. Northway, Inc.*, 462 U.S. 438, 439 (1976).

83. See Securities Exchange Act, Shareholder Proposals, 17 C.F.R. §§ 240.14a-4(a), 240.14a-5, 240.14a-8 (2002).

84. *Id.* § 240.14a-8.

of \$2,000 or a one percent interest in the total value of a company's securities.⁸⁵ These shareholder proposals are further limited; each qualified shareholder may only submit one proposal per meeting,⁸⁶ and the proposal must be 500 words or less.⁸⁷ Failure to comply with SEC requirements governing shareholder proposals could result in exclusion of the proposal from the shareholder meeting.⁸⁸

B. Legal Limitations

Although the materiality requirement functions with a broad capacity,⁸⁹ the definition of what constitutes a material fact has been limited. In the absence of a determination that a certain type of disclosure is material, there is no requirement to disclose.⁹⁰ The deficiency of case law in extending the definition of materiality to include human rights liabilities, coupled with the lack of SEC provisions requiring disclosure of such activities, results in no affirmative duty for ICs to release information about their labor practices internationally.⁹¹

Utilizing shareholder proposals to internally effect changes in the practices of ICs to reduce their negative social impact also has limitations. The concept of the shareholder proposal as a method to require ICs to become more socially responsible was introduced almost forty years ago.⁹² In the late 1960s, a shareholder initiative spearheaded by the Medical Committee for Human Rights attempted to include a vote to amend Dow Chemical Company's core business

85. *Id.* § 240.14a-8(b)(1).

86. *See id.* § 240.14a-8(c).

87. *See id.* § 240.14a-8(d).

88. *Id.* § 240.14a-8(f)(1). "The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies . . ." *Id.*

89. *See Cherington, supra* note 2, at 1448.

90. A "corporation is believed to have no obligation, unless that obligation is specially defined by law or contract." Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets, and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591, 610 (2008).

91. *See Cherington, supra* note 2, at 1449.

92. *See Med. Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403, 406-07 (1972).

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documents to prohibit the sale of napalm to be used on humans in Vietnam.⁹³ In 2008, seventeen shareholder proposals were included in the annual Exxon Mobile shareholder meeting.⁹⁴

In many cases, the IC may be permitted to exclude the shareholder proposal altogether.⁹⁵ ICs can decline to include a shareholder proposal if it is in violation of the law or proxy rules, is irrelevant, cannot be enforced by the IC, deals with day to day management operations, related to an election, furthers a personal interest, conflicts with a company's proposal, has already been implemented, or is duplicative.⁹⁶ If and when these provisions are included in shareholder proposals, they still must be voted on by shareholders, and oftentimes, they fail.⁹⁷

IV. WHAT CORPORATIONS HAVE THE COURAGE TO DO ON THEIR OWN

Outside the mandatory reporting required by the SEC,⁹⁸ many ICs have taken independent initiatives to show their dedication to responsible business practices, including making affirmative commitments to protect human rights.⁹⁹ The concept of corporate responsibility has become "the norm instead of the exception within the world's largest companies."¹⁰⁰ Consequently, ICs are in a unique

93. *See id.* at 661.

94. Letter from Paul S. Atkins, SEC Comm'r, to U.S. Chamber of Commerce (July 22, 2008) *available at* <http://www.sec.gov/news/speech/2008/spch072208psa.htm>.

95. Securities and Exchange Commission, 17 C.F.R. § 240.14a-8(i) (2002).

96. *Id.*

97. *See generally* Press Release, CRS Newswire, Shareholder Proposals Receive Record Support at Exxon Mobil Annual Meeting (June 7, 2002), *available at* <http://www.csrwire.com/PressRelease.php?id=1147> (discussing the inclusion of a variety of human rights and other proposals, all of which failed at the 2002 Exxon shareholder meeting). In SEC Commissioner Paul S. Atkins' release to the U.S. Chamber of Commerce, Atkins commented on the nearly twenty shareholder resolutions proposed at the 2008 Exxon Mobil shareholder meeting. In a repeat of the 2002 meeting, all of the shareholder proposals failed. Atkins, *supra* note 94.

98. *See supra* Part II.

99. *See* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 158 (1997).

100. KPMG, INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2 (2008), <http://www.kpmg.com/Global/en/IssuesAndInsights/>

position to have the potential to make a substantial impact on the development of human rights.¹⁰¹

A. Corporate Codes of Conduct

Conventionally, the responsibilities of corporations have not included an obligation to protect human rights internationally.¹⁰² However, over the last decade, in response to criticism about international practices, many ICs have adopted a corporate code of conduct (CCC) to dictate policies and procedures for their practices.¹⁰³ Today, nearly every organization has some guiding principles about the management of labor activities.¹⁰⁴ The support of the CCC extends beyond just the business arena, and use of the CCC has permeated virtually every major industry.¹⁰⁵ Many of these codes include provisions protecting the rights of workers.¹⁰⁶ As a result of the SOA,¹⁰⁷ the SEC requires ICs to have a CCC or some other form of ethics policy, but this policy need only apply to executive level officers.¹⁰⁸ However, many ICs extend the use of the CCC to also provide standards for supervising their international operations.¹⁰⁹ Although the concept of obligating ICs to create and maintain a CCC to protect labor rights internationally has been discussed in

ArticlesPublications/Documents/International-corporate-responsibility-survey-008.pdf.

101. "Some of the most significant non-state actors in the world today are private corporations, *specifically* [transnational corporations]." Frey, *supra* note 99, at 158 (emphasis added).

102. *See id.* at 154.

103. *See id.*

104. *See* Owen Herrnstadt, *Voluntary Corporate Codes Of Conduct: What's Missing?*, 16 LAB. LAW. 349, 349 (2001).

105. *Id.* (noting that codes now exist in the "apparel, oil, electronics, and general manufacturing" industries).

106. *Id.* at 349-50.

107. Sarbanes-Oxley Act, 15 U.S.C. § 7241 (2006).

108. Peter Rossiter et al., *A Closer Look at Codes of Ethics*, 15 SAV. & CMTY. BANKER 26, 26 (2006).

109. Richard Lock & Monica Romis, *Improving Work Conditions in a Global Supply Chain: Labor Laws and Legislation*, MIT SLOAN MGMT. REV., Mar. 15, 2007, at 54.

Congress,¹¹⁰ no action has been taken to codify the resolution. An IC's formation and adherence to a CCC to protect workers is largely voluntary.

B. Reporting Initiatives

In addition to creating a CCC, many ICs have also begun publishing some form of a corporate responsibility report (CRR), either independently or using some other set of standards for their reporting.¹¹¹ KPMG is an audit, tax, and advisory firm that provides services to assist businesses with maintaining compliance with a variety of regulatory and self-imposed schematics, including ethics reporting.¹¹² In its 2008 International Survey of Corporate Responsibility Reporting,¹¹³ KPMG found that between 2005 and 2008, the number of organizations releasing some variety of a CRR increased by thirty percent.¹¹⁴ As giants in their respective industries, companies like Pepsi,¹¹⁵ Deloitte,¹¹⁶ and Staples¹¹⁷ all issued CRRs for 2007.

110. See Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001). As written, the legislation would require "[a] national of the United States that employs more than 20 persons in a foreign country, either directly or through subsidiaries . . . [to] take the necessary steps to implement the Corporate Code of Conduct." *Id.* § 3(a).

111. Compare Press Release, Business Editors/Beverage Writers, The Pepsi Bottling Group Releases 2007 Corporate Responsibility Report (Oct. 6, 2008) (on file with author) [hereinafter Pepsi] (using the Global Reporting Initiative standards for the report) with Press Release, Deloitte, Deloitte Releases Inaugural Corporate Responsibility Report (Oct. 2, 2008) (on file with author) *available at* 10/2/08 PR Newswire 12:48:00 [hereinafter Deloitte] (relying on alternative guidelines for report compilation).

112. See generally About KPMG, <http://us.kpmg.com/about/ethics.asp> (last visited Dec. 9, 2009).

113. KPMG, INTERNATIONAL SURVEY, *supra* note 100, at 2. "KPMG conducts the International Survey of Corporate Responsibility Reporting every three years to gain insight into CSR reporting and to contribute to the evolving global dialogue on transparency and accountability. The 2008 survey was conducted in 22 countries and with more than 2200 businesses around the world." *Id.*

114. *Id.*

115. Pepsi, *supra* note 111.

116. Deloitte, *supra* note 111.

Some ICs utilize outside sources to provide standards and guidelines for their CRR.¹¹⁸ The Global Reporting Initiative (GRI) is an example of an entity developed to provide a procedure for creating a CRR.¹¹⁹ Focusing on the concept of sustainable development, GRI provides a guide for ICs to follow when preparing CRRs.¹²⁰ “The GRI Reporting Framework is intended to serve as a generally accepted framework for reporting on an organization’s economic, environmental, and social performance.”¹²¹ The guidelines include specific, step by step instructions for ICs dictating how the report should be compiled, what factors to consider in reporting, how to weigh and grade each factor, and recommendations about updating reports.¹²² The triggers that GRI uses in determining the human rights performance of an IC include evaluation of the investment and procurement practices of an IC, training and policies regarding human rights issues, respect for indigenous rights, use of child labor, and collective bargaining practices, amongst other factors.¹²³ Upon completion of the report evaluating the various standards GRI provides, a company earns a grade based on the total from each GRI standard.¹²⁴ The GRI webpage includes a list of companies that submitted reports, along with a letter grade awarded to the company based on the various aspects of performance—if the company opts to publish the grade.¹²⁵ Also included on the GRI website is whether a

117. See generally Press Release, Staples, Staples Releases Corporate Responsibility Report (Sept. 9, 2008) (on file with author) available at 2008 WLNR 17829835. Staples began conducting social responsibility audits in 2007. *Id.*

118. See, e.g., Pepsi, *supra* note 111. In submitting its 2007 CRR, Pepsi used the Global Reporting index guidelines. *Id.*

119. Global Reporting Initiative Home Page, <http://www.globalreporting.org/home> (last visited Dec. 9, 2009).

120. Global Reporting Initiative, G3 Sustainability Reporting Guidelines 1, http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF25F735235CA44/0/G3_GuidelinesENU.pdf (last visited Dec. 9, 2009) [hereinafter GRI Sustainability Guidelines].

121. *Id.* at 3.

122. *Id.*

123. *Id.* at 33-35.

124. *Id.* at 38.

125. Global Reporting Initiative, 2008 Reports List, <http://www.globalreporting.org/GRIReports/2008ReportsList/> (last visited Dec. 9, 2008) [hereinafter GRI 2008 Reports List].

company prepared the report internally or consulted GRI or another entity to have the results verified by a third party.¹²⁶

C. Voluntary Associations

Another way ICs have shown commitment to corporate responsibility is through voluntary association with organizations dedicated to corporate accountability. The United Nations Global Compact (UNGC)¹²⁷ is an example of this type of association. Businesses, consumers, cities, and students are among those invited to make a commitment to the UNGC and its ten principles.¹²⁸ These ideals are derived from a variety of international agreements on human rights and environmental issues.¹²⁹ As a business joining the UNGC, an IC commits to integrate the principles of the UNGC into business practices and procedures, apply the principles when making management decisions, aid in facilitation of UNGC objectives, release some sort of annual CRR, and advocate the goals of the UNGC.¹³⁰ According to Mayor Frank Jackson, Mayor of the City of Cleveland, members of the UNGC

are voluntarily taking responsibility for the impact of their activities on customers, suppliers, employees, shareholders, communities and other stakeholders, as well as the environment through sustainability and ethical business practices. With over 4,000

126. *Id.*

127. *See, e.g.,* United Nations Global Compact Home Page, <http://www.unglobalcompact.org> (last visited Dec. 9, 2009); Global Reporting Initiative Home Page, <http://globalreporting.org> (last visited Dec. 9, 2009).

128. United Nations Global Compact Home Page, <http://www.unglobalcompact.org> (follow “How to Participate” hyperlink) (last visited Dec. 9, 2009).

129. United Nations Global Compact Home Page, <http://www.unglobalcompact.org> (follow “About the GC” hyperlink; then follow “The Ten Principles” hyperlink) (last visited Dec. 9, 2009). The Ten Principles of the United Nations Global Compact originate from The Universal Declaration of Human Rights, International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. *Id.*

130. United Nations Global Compact Home Page, <http://www.unglobalcompact.org> (follow “How to Participate” hyperlink; then follow “Business Participation” hyperlink) (last visited Dec. 9, 2009).

worldwide corporate members, including companies such as Coca-Cola and Microsoft, it is the world's largest social responsibility movement.¹³¹

In April 2008, Mayor Jackson announced that Case Western Reserve University and Cleveland Clinic had joined the many other organizations as a member of UNGC, making a pledge to corporate social accountability and transparency in business.¹³²

D. Limitations on Voluntary Disclosures

Independent initiatives to commit to adherence to international labor and human rights standards are valuable, but there are significant limitations to these voluntary programs. The most notable limitation on the ability of a CCC and CRR to more positively influence the activities of ICs is the lack of consistency amongst the various codes of conduct and reporting procedures.¹³³ This may be attributable, in part, to an absence of basic, identifiable standards regarding the conduct of ICs.¹³⁴ A CCC is derived at the organizational level and there are no legal guidelines dictating the content, so ICs can include or exclude any provisions they wish.¹³⁵ "Since the codes are voluntary in nature, they are not written to impose constraints that [ICs] would find onerous. Instead, the codes are crafted to promote conduct that, although it entails some costs to the [IC], brings greater benefits to the [IC]."¹³⁶ Additionally, a CCC may not even be enforceable on the organizational level when an IC employs third party contractors outside the United States.¹³⁷

131. Press Release, Mayor of Cleveland, City of Cleveland, Case Western Reserve University and Cleveland Clinic Make Landmark Commitment to Social Responsibility (Apr. 22, 2008) (on file with author).

132. *Id.*

133. *See, e.g., supra* text accompanying note 111.

134. "Currently, there is no clear indication of the prevalence of basic corporate citizenship tenets—namely human rights, labour rights, environmental protection and anti-corruption" Hall, *supra* note 1, at 30.

135. The Corporate Code of Conduct Act addressed this issue of basic corporate citizenship standards; however, the legislation never passed through Congress. *See* Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001).

136. Murphy, *supra* note 2, at 402.

137. *Id.* at 401.

Inconsistency also impairs the value of the CRR. Even amongst companies that completed CRRs using GRI standards, deviations from the GRI requirements could arise during implementation, as no third party verification is required before a report is submitted to the GRI. For example, according to the GRI summary of companies that submitted CRRs, less than twenty of the U.S. based companies that submitted these reports to the GRI had the reports verified by either a third party or the GRI, and many of the organizations failed to include a letter grade to indicate overall performance based on the factors identified by the GRI.¹³⁸ Although overall the number of ICs releasing CRRs has increased, the content and factors used in preparing the report are not consistent among those ICs releasing CRRs.¹³⁹

Another significant restraint on the success of a CCC and CRR as tools for protecting human rights is enforcement. As to the issue of non-required disclosures, ICs are effectively self-regulating, and as such have no affirmative duty to either adopt or utilize any CCC or participate in any reporting regarding these issues.¹⁴⁰ Inevitably, there are no ramifications for failing to adhere to the CCC or to release a CRR.¹⁴¹ With no enforcement, the legitimacy of the CRRs and CCC is considerably reduced.¹⁴²

Similarly, the legitimacy of IC membership in associations designed to promote core labor and human rights standards as an indicator of an IC's conduct outside the United States is suspect. There is no clear connection between an IC's relationship with the UNGC and a reduced negative impact or improvement by member companies to promote international labor rights.¹⁴³ In fact, "[o]f the 103 companies [associated with UNGC] contacted by the investors, 30

138. GRI 2008 Reports List, *supra* note 125.

139. *See supra* note 111 and accompanying text.

140. Cherington, *supra* note 2, at 1449. "Although securities laws do require disclosure of issues that the SEC has determined to be material to investors, the SEC has largely deemed immaterial corporate compliance with international human rights and labor standards. Therefore, there is no mandatory disclosure of such issues." *Id.*

141. *See supra* text accompanying note 90.

142. Consistency is lacking even amongst ICs that use the GRI standards for submission of CRRs. *See supra* text accompanying note 90.

143. Helen Warrell, *Finance: Social Awareness Urged on Companies*, THIRD SECTOR, Jan. 16, 2008, at 9.

do not report back to the UN Global Compact on how well they follow its principles, 48 have shown poor performance and [only] 25 are being congratulated for their good reporting records.”¹⁴⁴ Membership is not tied to any enforcement mechanism permitting member expulsion or public notification of poor performance. Even though the UNGC encourages reporting and other corporate social responsibility procedures, without ramifications for failure to maintain a CCC or CRR,¹⁴⁵ the same limitations of the CCC and CRR result.

Furthermore, because voluntary associations allow membership without requiring accountability, ICs may join for mere appearances, reaping the benefits of claiming an association with the UNGC without making any real commitment to changing business practices to conform to UNGC objectives.¹⁴⁶ Although it seems ICs are prepared to make the move to more regulated disclosures of human rights liabilities, the limitations of self-regulatory mechanisms call for a more legitimate, effective alternative to manage consistency in human rights reporting.

V. FOLLOW THE LEGISLATIVE ROAD

A. *The Legal Pathways to Modification*

There are three distinct ways the SEC reporting requirements can be modified to include human rights disclosures: through a legal determination by a U.S. federal court that these facts are material to

144. *Id.*

145. Murphy, *supra* note 2, at 412. “There is no legal obligation placed upon the companies and no enforcement of such obligations . . .” *Id.*

146. Symposium, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT’L L.J. 481, 482 (2001). The fear was,

these corporations would simply cloak themselves in the legitimacy of the blue UN blanket while they continue to pollute the environment, plunder national resources and exploit the indigenous workforce, including children. The price of membership, they argued, was too cheap. After all, the corporations were only required to commit their support to the principles of the Compact, and post on the world wide web, at least once a year, the concrete steps they have taken to act on any of the nine principles in their own corporations and the lessons learned from doing so.

Id.

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shareholders,¹⁴⁷ with revision of the reporting requirements by the SEC,¹⁴⁸ and through legislation.¹⁴⁹ With each option there are benefits and limitations, as discussed below.

1. Litigation: Using the 10b-5 Shareholder Action¹⁵⁰ and Alien Tort Claims Act¹⁵¹

An owner of a security interest can bring a private right of action¹⁵² for failure of an IC to disclose a material fact.¹⁵³ In order to assert a successful 10b-5 claim, the shareholder must allege reliance on a material misrepresentation or omission, either intended or as a result of recklessness by an IC in a security transaction.¹⁵⁴ Increasing

147. Shareholder actions could be filed in either state or federal court. With the goal of achieving a determination from the court that human rights disclosures are material, federal district court is the proper venue because these courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331 (2006), and this particular determination would be derived from the regulations and laws of the federal government. *See supra* Part III.

148. *See Williams, supra* note 57, at 1199 (providing a thorough assessment of the SEC's regulatory powers as applied in a context of social disclosures and identifying the opportunity for SEC to propagate regulations requiring ICs to make disclosures about the labor and environmental impact of the company).

149. *See infra* Part V.B-C.

150. 17 C.F.R. § 240.10b-5 (2002). In her 2004 comment, author Rachel Cherington provides a compelling and well researched argument for using 10b-5 shareholder derivative actions to expand the materiality definition as a mechanism for enforcing international human rights standards. Cherington, *supra* note 2, at 1463-64.

151. Alien Tort Claims Act, 28 U.S.C. 1350 (2006). Use of the Alien Tort Claims Act (ATCA) to hold companies liable for human rights transgressions abroad has also been discussed as a mechanism for IC accountability. *See, e.g.,* Shanaira Udhwadia, Note, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359, 362 (2004); Khurram Nasir Gore, Comment, *Xiaoning V. Yahoo!: Piercing The Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 97, 98 (2008); Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325 (2003).

152. *See Superintendent of Ins. of State of N. Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) and text accompanying note 77.

153. *See supra* Part III.A. *See also* 17 C.F.R. § 240.10b-5 (2002).

154. *See Cherington, supra* note 2, at 1449-50.

evidence indicates some investors consider the nature of an IC's activities and practices when making a socially responsible security purchase, having the possible effect of making human rights disclosures "material,"¹⁵⁵ yet no court has recognized human rights or labor liabilities as such. Application of the Alien Torts Claims Act (ATCA) also supports the materiality of an organization's conduct internationally. Although successful application of the ATCA has been sporadic, the progression seems to be geared toward expansion of its use in claims against major corporations for international conduct.¹⁵⁶ In a Metropolitan Corporate Counsel article warning international businesses to recognize the potential for liability under the ATCA, the authors prophesize that "[a]lthough no company has been held liable . . . for human rights abuses carried out abroad, plaintiffs' lawyers are trying to establish a roadmap for a successful corporate . . . case."¹⁵⁷ Moreover, the Second and Ninth Circuit courts have alluded to the possibility of successful secondary liability claims under the ATCA, increasing potential exposure to lawsuits.¹⁵⁸ As more claims filed pursuant to the ATCA survive preliminary motions to dismiss, the likelihood that these cases will continue to progress becomes more palpable.¹⁵⁹ Continued expansion of the ATCA¹⁶⁰ as a mechanism to hold ICs accountable for their international labor activities provides tangible verification that this type of conduct impacts costs to the organization, increasing the likelihood human rights violations are in fact material in securities transactions.¹⁶¹

155. The concept of the socially responsible investor provides evidence these types of disclosures are in fact material. *See, e.g.,* Maria O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 AM. U. L. REV. 1 (1992).

156. B. Keith Gibson & Jeremy T. Grabill, *A Growing Danger on the Horizon for Companies Doing Business Internationally: Corporate Liability Under the Alien Tort Statute*, METROPOLITAN CORP. COUNS., Feb. 1, 2009, at 34, 34.

157. *Id.*

158. *Id.*

159. *Id.*

160. The ATCA resulted in the district courts obtaining "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

161. *See supra* note 150.

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Although a court determination that human rights disclosures *are* material could feasibly result in greater accountability for ICs, other aspects of relying on this avenue to improve transparency will likely delay the process. The most significant barrier is timing. The Speedy Trial Act of 1974 dictates timelines to ensure that criminal defendants have access to a speedy trial.¹⁶² However, this is only applicable in *criminal* cases. A suit brought pursuant to a 10b-5 shareholder action would originate in civil court and is not subject to the timeline requirements of the Speedy Trial Act.¹⁶³ Congressional legislation suggested civil trials be scheduled within eighteen months of the filing date, but there are no legal guarantees to an expeditious civil trial.¹⁶⁴

Other factors, such as the number of cases filed, court room or judge availability, and pretrial settlement negotiations may further impede the progress of a civil case.¹⁶⁵ According to Federal Court Management Statistics, 257,507 civil cases were filed in federal district courts in 2007 and took an average of over eight and a half months to be decided.¹⁶⁶ Of the cases pending in federal court, approximately seven percent were filed over three years ago.¹⁶⁷ Waiting for a case to be filed and decided does not guarantee an improved scheme of reporting human rights liabilities and is more time consuming than necessary, particularly when other options are available.¹⁶⁸ Additionally, once an action is filed, there is no guarantee that a court will find human rights disclosures as material.

162. Speedy Trial Act of 1974, 18 U.S.C. § 3161 (2006).

163. *Id.* The limitation of the Act's applicability to civil cases is evident by the language in part (a), indicating the Act applies "[i]n any case involving a defendant charged with an offense." *Id.*

164. *See* Federal U.S. Courts Management Statistics Page, <http://www.uscourts.gov/fcmstat/index.html> (follow the "District Courts" hyperlink under "Federal Court Management Statistics-2007," select "All District Courts," then click "Generate") (last visited Dec. 9, 2009).

165. *Id.*

166. *Id.*

167. *Id.*

168. For a more comprehensive explanation of some of the timing and other limitations of the judicial process, see John J. Kerr, Jr. et al., *Stage I: Fundamentals of Commercial Litigation in the United States*, in *ECONOMIC CONSEQUENCES OF LITIGATION WORLD WIDE* 385 (Charles Platto ed., Kluwer Law International 1998).

2. Administrative Reform

The SEC is empowered to create administrative regulations to ensure compliance with federal law.¹⁶⁹ These regulations include any rule the SEC “prescribes as necessary or appropriate in the public interest.”¹⁷⁰ The scope of this regulatory power is broad but focuses on public disclosure of information necessary to protect investors when making determinations about securities purchases.¹⁷¹ Seemingly, “because people in the social investor sector of the market are using socially significant information to make investment decisions, that information is clearly material to them,”¹⁷² permitting the SEC to take action. Amendments or additions to reporting requirements are made at the discretion of the SEC, and the SEC could feasibly include a provision mandating disclosure of labor activities of ICs.¹⁷³ Scholars have already identified the materiality of social disclosures to investors and the possibility of the SEC to require human rights disclosures, yet the SEC has not created any regulations to respond to the need for transparency in this area.¹⁷⁴

In the past, the SEC has been prodded into action as a result of public pressure coupled with Congressional activity.¹⁷⁵ Although the SEC has the power to require more comprehensive reporting, reliance on the SEC to take initiative is inefficient. Similarly, the courts have been reluctant to compel the SEC to create rules,¹⁷⁶ so it is unlikely

169. Securities Exchange Act of 1934, 15 U.S.C. § 78q (2006).

170. *Id.*

171. *See supra* Part III.A. *See generally* Securities and Exchange Commission, 17 C.F.R. § 200.1 (2002).

172. Williams, *supra* note 57, at 1288-89.

173. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78q (2006); *see also* Williams, *supra* note 57.

174. Williams, *supra* note 57 (providing an in-depth analysis of the opportunity and ability for the SEC to promulgate regulations mandating reporting of social liabilities).

175. *See* Elizabeth Ann Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. ENVTL. L. REV. 129, 130-31 (1992).

176. *See, e.g.,* Natural Res. Def. Council, Inc., v. SEC, 606 F. 2d 1031 (D.C. Cir. 1978) (public interest group sued the SEC for failure to promulgate certain rules requiring disclosures for ICs and court adopted a narrow review of the SEC’s power to make those determinations).

that litigation will provide an opportunity to motivate the SEC into action. The D.C. Circuit Court of Appeals has determined that the regulatory power of the SEC permits only minimal review of the SEC's promulgation of rules, and even then review is limited to the determination of whether the SEC regulations are in compliance with other federal law.¹⁷⁷

3. Congressional Action

During the 1970s, social activists played a pivotal role in creating additional environmental disclosure requirements for ICs.¹⁷⁸ As a result of the pressure to recognize the importance of obligating ICs to disclose environmental liabilities, Congress considerably transformed environmental law.¹⁷⁹ In response, the SEC renovated reporting requirements to ensure compliance with these new regulations.¹⁸⁰ Similarly, with a new generation of activists, and a new excitement about involvement in the political process,¹⁸¹ legislation focused on creating standards for ICs is likely to have wide support.

Using the dense regulatory scene of the 1970s that changed the environmental regulatory scheme as a model,¹⁸² Congress can create a legislative plan creating identifiable commitments to human rights disclosures in business. Legislation provides the foundation for a more comprehensive reporting scheme with general standards to provide consistency, while permitting the SEC to detail the specifics of the

177. *Id.* at 1053.

178. Cherington, *supra* note 2, at 1447. *See generally* Perry E. Wallace, *Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives Pollution Control*, 50 WASH. & LEE L. REV. 1093, 1097 (1993) (discussing the change in SEC environmental reporting requirements, and the potential of such changes to provide incentives to businesses, consequently resulting in pollution reduction).

179. In 1980, Congress passed the Comprehensive Environmental Response Compensation and Liability Act. 42 U.S.C. § 9601 (2006). Along with other initiatives, this contributed to a series of new SEC regulations modifying the reporting requirements for ICs. *See generally* Geltman, *supra* note 175; Wallace, *supra* note 178.

180. *See* Geltman, *supra* note 175, at 130-31.

181. *See supra* Part II.B.

182. For examples of how legislation initiated changed in the SEC reporting requirements, see Geltman, *supra* note 175; *see also* Wallace, *supra* note 178.

reporting requirements. This will result in more comprehensive and reliable reporting procedures for ICs.

B. How Disclosures Benefit ICs

ICs benefit greatly from transparency in business.¹⁸³ Socially responsible investments account for over ten percent of managed assets in a trillion dollar industry,¹⁸⁴ and socially responsible investors make investment decisions factoring in the social impacts beyond required SEC disclosures.¹⁸⁵ A recent report conducted by Boston College Center for Corporate Citizenship showed that public opinion about an organization's reputation is linked to the public perception of how that company's corporate governance functions; particularly a company's ethics and transparency.¹⁸⁶ Image and brand recognition are valuable commodities for ICs, and the public view of an IC's reputation can positively or negatively impact sales.¹⁸⁷

The concept of socially responsible investing is not limited to the purpose of promoting specific social agendas, rather it is "simply good business."¹⁸⁸ According to director Paul Hilton of Advanced Equities Research at Calvert Investments, "[p]eople realize that investing in companies with better performance in issues of environmental, social, and corporate governance will help them identify companies with better financial performance, either because of less risk or because they're better managed."¹⁸⁹

183. Elizabeth Wine, *SRI Plows the Path to Profitability*, ON WALL STREET, Aug. 1, 2009, at 26 ("Socially responsible investing is no longer the province of college professors who want to save the world. It's evolving and going mainstream in a big way.").

184. Adam J. Sulkowski et al., *Corporate Responsibility Reporting in China, India, Japan, and the West: One Mantra Does Not Fit All*, 42 NEW ENG. L. REV. 787, 789 (2008). See also Wine, *supra* note 183. Socially responsible "investments in the U.S. alone account for \$2.7 trillion." *Id.*

185. Hylton, *supra* note 155, at 7-8.

186. *Perception of Corporate Responsibility Linked to Reputation*, CSR NEWswire, Oct. 16, 2008, <http://www.csrwire.com/News/13470.html>.

187. See, e.g., Stanley Ziemba, *Pepsi Yields, Ends Burma Venture*, CHI. TRIB., Apr. 24, 1996, at 1 (stating that in response to protests about the conditions of workers, Pepsi closed its operations in Burma).

188. Wine, *supra* note 183.

189. *Id.*

The returns of organizations toting banners of social responsibility reconcile this idea. Companies with functioning corporate social responsibility plans have reported increased financial success.¹⁹⁰ Moreover, ICs that prepare CRRs are able to more readily identify areas of opportunity, permitting them to increase profitability through reduction of costs.¹⁹¹ As head of the newly developed Corporate Responsibility and Sustainability group at Burr Pilger & Mayer LLP and associate director of the GRI, James C. Murphy, Ph.D. acknowledged some of the business benefits of improved social reporting. According to Murphy, “[c]ompanies who undertake integrated corporate responsibility and sustainability programs will gain a competitive advantage over others in their respective sectors; more and more, this means understanding and recognizing the value of financial and non-financial data for overall business performance and competitiveness.”¹⁹² Improving disclosure requirements to encourage transparency will result in a better public perception of an organization and, overall, will likely increase an IC’s market and profits.

C. Authority for Legislation

The most appropriate venue for modification of human rights reporting requirements for ICs is through Congressional legislation. Pursuant to their authority to regulate interstate commerce, Congress has the power to “make all Laws which shall be necessary and proper” to effectively manage interstate transactions.¹⁹³ In clarifying this authority, the Supreme Court has identified this regulatory power as an affirmative authority¹⁹⁴ with broad and comprehensive legislative

190. Sulkowski et al., *supra* note 184, at 789 (“[T]here is growing evidence of a demonstrable positive correlation between good financial performance and successful management of commitments to corporate responsibilities.”).

191. *Id.* at 794.

192. Press Release, Business Wire, BPM & MacKenzie Communications Launch Joint Venture Focused on Corporate Responsibility and Sustainability (Sept. 18, 2008) (on file with author).

193. U.S. CONST. art. I, § 8, cl. 18.

194. *See, e.g.*, *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 551 (1944) (indicating that limiting the ability to regulate certain types of transactions deprives Congress of the power derived from the interstate commerce clause).

control. Historically, the Court has identified the power of Congress to manage interstate commerce as “supreme and paramount.”¹⁹⁵ “It is the congress, *and not the judicial department*, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can *never* take the initiative on this subject.”¹⁹⁶ Similarly, this power belongs solely to Congress; the individual states do not have the power to regulate interstate commerce activities.¹⁹⁷ “It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive.”¹⁹⁸ Thus, the most legitimate source for enhancing the requirements of ICs is Congress.

D. The Road Home: Legislative Proposal

Congress is in a position to initiate legislation to spark human rights reporting requirements to be promulgated by the SEC.¹⁹⁹ Initiating standards and commitments to monitoring human rights activities internationally, while permitting the SEC to determine the best procedures to meet these new demands as defined by the legislature, is the most efficient option for requiring human rights disclosures. Waiting for the courts to decide the issue of whether human rights concerns are material may be time consuming, particularly because no such determination has been made in the past. Similarly, a court decision regarding the materiality of such issues may not result in a requirement for human rights disclosures, primarily because courts have declined to require the SEC to create rules regarding these types of issues. Additionally, it is unlikely that the SEC will initiate regulations altering reporting requirements independent of some legislative initiative. But past performance indicates that the SEC can successfully implement and maintain a regulatory scheme adhering to the changing needs and priorities of

195. *Parkersburg & Ohio River Transp. Co. v. City of Parkersburg*, 107 U.S. 691, 739 (1883).

196. *Id.* at 740-41 (emphasis added).

197. *Mo. Pac. R.R. Co. v. Stroud*, 267 U.S. 404, 408 (1925).

198. *Id.*

199. This concept has been effective in the environmental context. *See e.g.*, Geltman, *supra* note 175.

society.²⁰⁰ Subpart K of the SEC regulations includes the commission's compliance with federal environmental reforms, and is an example of how the SEC has effectively addressed compliance with similar legislative direction by incorporating new environmental standards into existing reporting requirements.²⁰¹ New legislation identifying standards for U.S. companies will result in new SEC rules regarding human rights disclosures, which in turn has the effect of holding ICs accountable for providing reliable disclosure.²⁰²

Overall, ICs are prepared for more comprehensive disclosure requirements pertaining to human rights. Many ICs have already included corporate responsibility practices through reporting and adopting a CCC as part of their standard operating procedures.²⁰³ Independent auditing agencies have begun integrating corporate responsibility accounting as part of their services.²⁰⁴ The next step requires Congressional action to create legislation to motivate the SEC to create rules governing disclosures, similar to those initiatives passed in the 1970s.

In addition to the benefits disclosure will have for participating ICs, new disclosure requirements result in improved public access to an IC's impact on international labor and human rights issues. Greater public access to this information will encourage ICs to be more cognizant of decisions pertaining to labor. In the past, the public has played an instrumental role in influencing how ICs conduct business.²⁰⁵ For example, in the mid-1990s Pepsi was criticized for having operations in Burma, a country widely recognized for human

200. Wallace, *supra* note 178, at 1098; Geltman, *supra* note 175, at 133 ("Before the state and federal governments enacted comprehensive environmental legislation, the securities laws had no provisions expressly relating to disclosure of registrants' environmental policies or contingent environmental liabilities.").

201. See Securities and Exchange Commission, 17 C.F.R. § 200.550 (2002).

202. See generally Michael L. Hickok & Janet S. Hoffman, *Section 10b-5 Claims for Non-Disclosure of Contingent Cleanup Liabilities*, 3 TOXICS L. REP. 315 (Aug. 3, 1988).

203. See *supra* Part IV.

204. See, e.g., BPM & MacKenzie Communications Launch Joint Venture, *supra* note 192.

205. Boni Brewer & Wylie Wong, *Pepsi's Ties to Burma Cost it UC-Berkeley Contract*, CONTRA COSTA TIMES, Dec. 11, 1996, at A10.

rights abuses.²⁰⁶ Activists across the country protested Pepsi's bottling venture in Burma, ultimately leading to Pepsi's withdrawal from the area.²⁰⁷ Today, Pepsi participates in corporate responsibility reporting through the GRI.²⁰⁸ Likewise, this increased access to information could inspire a public response and call for ICs to behave more responsibly when conducting business.

VI. CONCLUSION

ICs are powerful entities. The reach of the IC is often well beyond the borders of the United States and the laws that govern them. Continued expansion of ICs worldwide requires improved regulation to ensure that the protections afforded workers inside the United States are applied to ICs with labor forces in other countries. Creation and passage of legislation targeted at recognizing the negative impacts ICs have on labor and human rights enforcement internationally and obligating disclosure of these activities will result in the fuel necessary to motivate the SEC to change the reporting requirements for ICs. Improved transparency will elucidate potential issues of abusive behavior occurring outside the United States for shareholders and potential investors and the public. Unfettered access to an IC's international conduct regarding core issues of human rights and labor practices will result in greater accountability of ICs both to shareholders and the public, and will ultimately result in more socially responsible businesses.

206. *Id.*

207. Ziemba, *supra* note 187.

208. GRI 2008 Reports List, *supra* note 125.

